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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/764,114
Filing Date: January 23, 2004
Appellant(s): DABKOWSKI ET AL

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SEP 24 2007
GROUP 1700

Michael P. Aronson
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed June 5, 2007 appealing from the Office action mailed April 17, 2007.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,174,552	BARAVETTO ET AL	1-2001
2002/0192180	FAIRLEY ET AL	12-2002

2003/0022799	ALVARADO ET AL	1-2003
6,165,454	PATEL ET AL	12-2000
WO 00/02532	BROOKS ET AL	1-2000
WO 99/53889	GALLAGHER ET AL	10-1999
2003/0114323	BOOKER ET AL	6-2003

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-4, 7-9, 15, 16, 19, and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO00/02532.

'532 teaches a personal cleansing composition containing an anionic and/or amphoteric surfactant and a polymeric ester comprising a polyol, a monocarboxylic acid, and a dicarboxylic acid. See Abstract. Suitable anionic surfactants include alkyl ethoxy sulfate surfactants having from 2 to 6 moles of ethylene oxide and alkyl chain lengths of C12-C18. See page 6, lines 15-30. The anionic surfactants are present in amounts from 0.1 to 30% by weight. See page 7, lines 15-30. The compositions may contain a zwitterionic surfactant in amounts from 0.1 to 20% by weight and include alkyl betaines, cocoamido propylhydroxy sultaine, etc. See page 12, lines 20-30. Additionally, the compositions contain a polymeric conditioning agent in amounts from 0.01 to 5% by weight and include cationic cellulose resins, etc. See page 14, line 5 to page 15, line 256. Additionally, the compositions may include a water-insoluble oil such as a modified silicone oil such as octyl and decyl methicone. See page 20, lines 15-35.

The compositions may include viscosity control agents such as magnesium sulfate and other electrolytes and from about 20% to 99.89% by weight of water. See page 27, lines 18-30. Note that, the compositions as exemplified by '532 teach the use of sodium chloride in an amount of 0.5% by weight.

Note that, with respect to the Zein solubility, permeability, and wet-combing force properties as recited by instant claim 1, the Examiner asserts that the broad teachings of '532 would suggest compositions having the same Zein solubility, permeability, and wet-combing force properties as recited by instant claim 1 because '532 suggests compositions containing the same components in the same proportions as recited by the instant claims.

'532 does not teach, with sufficient specificity, a cleaning composition having the specific physical parameters containing an alkyl ethoxy sulfate surfactant, a betaine surfactant, a hydroxysultaine surfactant, a non-volatile, water-insoluble silicone, water, and the other requisite components of the composition in the specific proportions as recited by the instant claims.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to formulate a cleaning composition having the specific physical parameters containing an alkyl ethoxy sulfate surfactant, a betaine surfactant, a hydroxysultaine surfactant, a non-volatile, water-insoluble silicone, water, and the other requisite components of the composition in the specific proportions as recited by the instant claims, with a reasonable expectation of success and similar results with respect to other disclosed components, because the broad teachings of '532 suggests a

cleaning composition having the specific physical parameters containing an alkyl ethoxy sulfate surfactant, a betaine surfactant, a hydroxysultaine surfactant, a non-volatile, water-insoluble silicone, water, and the other requisite components of the composition in the specific proportions as recited by the instant claims.

Claims 1-4, 6-10, 15, 16, 19, and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Patel et al (US 6,165,454).

Patel et al teach a mild, aqueous, foaming, and conditioning detergent composition comprising 4 to 50% of a deterative surfactant selected from the group consisting of C8-C18 alkyl sulfates, C8-C18 alkyl ethoxy ether sulfates containing 1 to 5 ethoxy groups, etc, and optionally at least one of 0.1 to 5% by weight of an anionic hydrotrope, 0.1 to 15% of an amphoteric surfactant selected from the group consisting of C8-C18 alkyl betaines, C9-C18 alkyl sulfobetaines, etc., 0.1 to 4% of a nonionic surfactant provided hat the total amount of deterative surfactant is preferably in the range of 6 to 30%; from 0.01 to 10% of a water-insoluble conditioning agent which is selected from the group consisting of 0.1 to 6% of a water-insoluble silicone selected from the group consisting of dimethicones and silicones and a mixture of at least one silicone with 0.01 to 3% of a cationic polymer such as a quaternized cellulosic polymer; from 0.1 to 5% of an acrylic stabilizing agent, and the balance water. See column 2, line 30 to column 3, line 20. More specifically, suitable amphoteric surfactants include cocoamidopropyl betaines, cocamidopropylhydroxy sultaine, etc. See column 5, lines 35-50. Suitable quaternized cellulosic polymers include Polyquaternium-6,

Polyquaternium-10, etc. See column 6, lines 1-20. The water-insoluble silicones have viscosity in the range from 5 to 100,000. See column 3, lines 20-60.

Additionally, there may be other ingredients added to the composition including thickeners in amounts not greater than 1% by weight, viscosity controlling agents such as sodium chloride in an amount from 0.1 to 3% by weight, fragrance in amounts from 0.01 to 1.5% by weight, antibacterials, coloring agents, pH adjusters, etc. See column 7, lines 1-60.

Note that, with respect to the Zein solubility, permeability, and wet-combing force properties as recited by instant claim 1, the Examiner asserts that the broad teachings of Patel et al would suggest compositions having the same Zein solubility, permeability, and wet-combing force properties as recited by instant claim 1 because Patel et al suggest compositions containing the same components in the same proportions as recited by the instant claims.

Patel et al do not teach, with sufficient specificity, a cleaning composition having the specific physical parameters containing an alkyl ethoxy sulfate surfactant, a betaine surfactant, a hydroxysultaine surfactant, a non-volatile, water-insoluble silicone, water, and the other requisite components of the composition in the specific proportions as recited by the instant claims.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to formulate a cleaning composition having the specific physical parameters containing an alkyl ethoxy sulfate surfactant, a betaine surfactant, a hydroxysultaine surfactant, a non-volatile, water-insoluble silicone, water, and the other

requisite components of the composition in the specific proportions as recited by the instant claims, with a reasonable expectation of success and similar results with respect to other disclosed components, because the broad teachings of Patel suggest a cleaning composition having the specific physical parameters containing an alkyl ethoxy sulfate surfactant, a betaine surfactant, a hydroxysultaine surfactant, a non-volatile, water-insoluble silicone, water, and the other requisite components of the composition in the specific proportions as recited by the instant claims.

Claims 1-4, 6-9, 11, 12, 15, 16, 19, and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Alvarado et al (US 2003/0022799).

Alvarado et al teach a foamable, shampoo composition for cleansing hair which comprises about 0.005 to about 5% of a cationic deposition polymer, about 10 to about 20% of an anionic surfactant which is selected from the group consisting of an alkyl ether sulfate with at least about 2 moles of ethoxylation, about 0.5 to 1% of an organic salt of a carboxylic acid, about 6 to 15% of sorbitan derivative, about 3 to about 6% of a zwitterionic surface active compound, about 0.25 to 5% of an amphoteric surfactant, about 0.75 to about 1.5% of an alkoxyated carboxylic acid, about 0.1 to about 5% of a silicone copolyol, optionally an aerosol propellant, and water. See Abstract. Suitable cationic polymers include cationic cellulose derivatives, etc. See paras. 60-65. Suitable zwitterionic surfactants include cocamidopropyl betaine, cocamidopropyl hydroxysultaine, etc. See para. 84. Examples of suitable alkoxyated carboxylic acids include PEG 150 distearate, etc. See para. 93. Silicone copolyols that may be used in the composition include dimethicone, which is a dimethylsiloxane polymer having

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polyoxyethylene and/or poloxypropylene side chains. Also, the compositions may contain other ingredients such as humectants, fragrances, preservatives, buffers, etc. See para. 102. Note that, the Examiner asserts that “about 10%” by weight of an alkyl ether sulfate with at least about 2 moles of ethoxylation as taught by Alvarado et al would overlap with and suggest about 8% by weight of an alkyl ether sulfate having at least 3 moles of ethoxylation as recited by the instant claims. Alternatively, even if “about 10%” by weight of an alkyl ether sulfate with at least about 2 moles of ethoxylation does not overlap with about 8% by weight of an alkyl ether sulfate having at least 3 moles of ethoxylation as recited by the instant claims, the Examiner asserts that one of ordinary skill in the art would be motivated to use about 8% by weight of an alkyl ether sulfate with at least about 3 moles of ethoxylation in the composition taught by Alvarado et al, with a reasonable expectation of success, because one of ordinary skill in the art would expect similar results when using about 8% by weight of an alkyl ether sulfate with at least about 3 moles of ethoxylation in the composition taught by Alvarado et al based on its teaching of about 10% by weight of an alkyl ether sulfate with at least about 2 moles of ethoxylation. Note that, a prima facie case of obviousness exists where the claimed ranges and prior art ranges do not overlap but are close enough that one skilled in the art would have expected them to have the same properties. *Titanium Metals Corp. of America v. Banner*, 778 F.2d 775, 227 USPQ 773 (Fed. Cir. 1985). See MPEP 2144.05.

Note that, with respect to the Zein solubility, permeability, and wet-combing force properties as recited by instant claim 1, the Examiner asserts that the broad teachings

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of Alvarado et al would suggest compositions having the same Zein solubility, permeability, and wet-combing force properties as recited by instant claim 1 because Alvarado et al suggest compositions containing the same components in the same proportions as recited by the instant claims.

Alvarado et al do not teach, with sufficient specificity, a cleaning composition having the specific physical parameters containing an alkyl ethoxy sulfate surfactant, a betaine surfactant, a hydroxysultaine surfactant, a non-volatile, water-insoluble silicone, water, and the other requisite components of the composition in the specific proportions as recited by the instant claims.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to formulate a cleaning composition having the specific physical parameters containing an alkyl ethoxy sulfate surfactant, a betaine surfactant, a hydroxysultaine surfactant, a non-volatile, water-insoluble silicone, water, and the other requisite components of the composition in the specific proportions as recited by the instant claims, with a reasonable expectation of success and similar results with respect to other disclosed components, because the broad teachings of Alvarado et al suggest a cleaning composition having the specific physical parameters containing an alkyl ethoxy sulfate surfactant, a betaine surfactant, a hydroxysultaine surfactant, a non-volatile, water-insoluble silicone, water, and the other requisite components of the composition in the specific proportions as recited by the instant claims.

Claims 1-4, 6-10, 15, 16, 19, and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baravetto et al (US 6,174,522).

Baravetto et al teach aqueous conditioning shampoo compositions containing a surfactant component in a shampoo with a particulate insoluble, dispersed, nonvolatile conditioning agent having a dual particle size range, suspending agent and deposition polymer. See Abstract. Suitable surfactants include anionic, amphoteric, zwitterionic surfactants, etc., and mixtures thereof which may be used in amounts from about 5% to about 50% by weight. Suitable anionic surfactants include alkyl and alkyl ether sulfates containing from about 12 to about 18 carbon atoms and from 1 to about 10 moles of ethylene oxide. Suitable amphoteric surfactants include betaines, sultaines, etc., such as amidohydroxysultaines, cocoamidopropylbetaine, etc. See column 7, line 50 to column 8, line 50; column 24, lines 15-69.

Additionally, the composition contains non-volatile silicone conditioning agents which have a viscosity between 5 and 1,000,000 centistokes and include insoluble silicone gums. See column 12, line 15 to column 15, line 55. Deposition polymers may also be used in the compositions and include those such as Polyquaternium-10. See column 21, lines 1-60. Water is present in the compositions in amounts from 20% to 94% by weight of the composition. See column 22, lines 40-50. Optional components such as perfumes, preservatives, skin active agents, sunscreens, thickeners, vitamins, etc., may be used in the composition in amounts from 0.001 to 10% by weight of the composition. See column 22, line 50 to column 23, line 5. Note that, a salt such as sodium chloride can be added to the mixture to thin or thicken the final product. See column 24, lines 1-10.

Note that, with respect to the Zein solubility, permeability, and wet-combing force properties as recited by instant claim 1, the Examiner asserts that the broad teachings of Baravetto et al would suggest compositions having the same Zein solubility, permeability, and wet-combing force properties as recited by instant claim 1 because Baravetto et al suggests compositions containing the same components in the same proportions as recited by the instant claims.

Baravetto et al do not teach, with sufficient specificity, a cleaning composition having the specific physical parameters containing an alkyl ethoxy sulfate surfactant, a betaine surfactant, a hydroxysultaine surfactant, a non-volatile, water-insoluble silicone, water, and the other requisite components of the composition in the specific proportions as recited by the instant claims.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to formulate a cleaning composition having the specific physical parameters containing an alkyl ethoxy sulfate surfactant, a betaine surfactant, a hydroxysultaine surfactant, a non-volatile, water-insoluble silicone, water, and the other requisite components of the composition in the specific proportions as recited by the instant claims, with a reasonable expectation of success and similar results with respect to other disclosed components, because the broad teachings of Baravetto et al suggest a cleaning composition having the specific physical parameters containing an alkyl ethoxy sulfate surfactant, a betaine surfactant, a hydroxysultaine surfactant, a non-volatile, water-insoluble silicone, water, and the other requisite components of the composition in the specific proportions as recited by the instant claims.

Claims 1-10, 15, 16, 19, and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fairley et al (US 2002/0192180) or WO 99/53889.

Fairley et al teach an aqueous shampoo composition comprising, in addition to water, a cleansing surfactant, preferably an anionic surfactant, a dispersed non-volatile, water-insoluble oily conditioning agent, and a cationic polymer. Suitable anionic surfactants include alkyl ether sulphates containing from 8 to 18 carbon atoms and 1 to 10 moles of ethylene oxide per molecule. Co-surfactants may also be used in the compositions in amounts from 0 to 8% by weight and include alkyl amidopropyl betaines, alkyl amidopropyl hydroxysultaines, etc. See paras. 50-61. Suitable cationic polymers include quaternized cationic cellulose such as Polyquaternium-10, etc. See para. 90. Additionally, optional ingredients may be used in the compositions including suspending agents, thickeners, perfumes, salts, sunscreen materials, antimicrobial agents, etc. See para. 96. Also, the compositions may include a conditioning agent such as preformed silicone microemulsions under the tradenames DC2-1865 and DC2-1870. The emulsified silicones typically have a viscosity of at least 10,000 centipoise and suitable silicones for use in the emulsions/microemulsions include cross-linked dimethiconol gum. See paras. 103-107. Fairley et al specifically teach compositions in which salts such as sodium chloride is used in the composition. See para. 148.

'889 teaches an aqueous shampoo composition containing, in addition to water, at least one cleansing surfactant, a cationic deposition polymer, a silicone component consisting of a blend of emulsified particles of an insoluble silicone, in which the emulsified particles of insoluble silicone are incorporated into the shampoo composition

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as a preformed aqueous emulsion having an average silicone particle size in the emulsion and in the shampoo composition of from 0.15 to 30 microns, and microemulsified particles of an insoluble silicone in which, in which the microemulsified particles of insoluble silicone are incorporated into the shampoo composition as a preformed aqueous microemulsion having an average silicone particle size in the microemulsion and in the shampoo composition of less than 0.1 microns. See Abstract. Examples of suitable preformed microemulsion include DC2-1865 and DC2-1870 and silicone gums are also available in a pre-microemulsified form. The viscosity of the silicone itself is typically at least 10,000 centipoise. See page 6, line 20 to page 7, line 36. The total amount of silicone is from 0.3 to 5% by weight of the composition. See page 9, lines 1-12.

The composition may include one or more cleaning surfactants which may be used singularly or in combination and are selected from anionic, amphoteric, zwitterionic surfactants, and mixtures thereof. Suitable anionic surfactants include alkyl ether sulfates in which the alkyl group contains from 8 to 18 carbon atoms and may contain from 1 to 10 ethylene oxide units per molecule. See page 9, line 10 to page 10, line 10. Examples of amphoteric and zwitterionic surfactants include alkyl amine oxides, alkyl betaines, alkyl amidopropyl betaine, alkyl amidopropyl hydroxysultaines, etc. The total amount of surfactant in the shampoo compositions is generally from 0.1 to 50% by weight of the composition. See page 12, lines 15-20. Suitable cationic polymers include cationic cellulose such as Polyquaternium-10, etc. See page 15, lines 20-30. Optional ingredients may be used including antimicrobial agents, colorants, dyes,

viscosity modifiers (e.g., thickening agents), preservatives, fragrances, sunscreens, chelating agents, etc. See page 18, line 25 to page 21, line 25. A salt such as sodium chloride is used in an amount of 2% in a composition specifically taught by '889.

Note that, with respect to the Zein solubility, permeability, and wet-combing force properties as recited by instant claim 1, the Examiner asserts that the broad teachings of Fairley et al would suggest compositions having the same Zein solubility, permeability, and wet-combing force properties as recited by instant claim 1 because Fairley et al or '889 suggest compositions containing the same components in the same proportions as recited by the instant claims.

Fairley et al or '889 do not teach, with sufficient specificity, a cleaning composition having the specific physical parameters containing an alkyl ethoxy sulfate surfactant, a betaine surfactant, a hydroxysultaine surfactant, a non-volatile, water-insoluble silicone, water, and the other requisite components of the composition in the specific proportions as recited by the instant claims.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to formulate a cleaning composition having the specific physical parameters containing an alkyl ethoxy sulfate surfactant, a betaine surfactant, a hydroxysultaine surfactant, a non-volatile, water-insoluble silicone, water, and the other requisite components of the composition in the specific proportions as recited by the instant claims, with a reasonable expectation of success and similar results with respect to other disclosed components, because the broad teachings of Fairley et al or '889 suggest a cleaning composition having the specific physical parameters containing an

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alkyl ethoxy sulfate surfactant, a betaine surfactant, a hydroxysultaine surfactant, a non-volatile, water-insoluble silicone, water, and the other requisite components of the composition in the specific proportions as recited by the instant claims.

Claims 11-13 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Patel et al (US 6,165,454), Fairley et al (US 2002/0192180), WO99/53889, WO00/02532, or Baravetto et al (US 6,174,522) as applied to the rejected claims above, and further in view of Booker et al (US 2003/0114323).

Patel et al, Fairley et al, '532, '889, and Baravetto et al are relied upon as set forth above. However, none of the references teach the use of PEG-150 distearate in addition to the other requisite components of the composition as recited by the instant claims.

Booker et al teach a moisturizing detergent composition that is mild to the skin and eyes. The composition includes a cationic polymer, a monoester emollient, a di- and/or tri-ester emollient, and a surfactant. The compositions are useful as shampoos, washes, baths, gels, lotions, creams, and the like. See Abstract. Surfactants suitable for use include anionic, nonionic, amphoteric, betaine, or cationic, as well as mixtures thereof. Suitable anionic surfactants include alkyl sulfates, alkyl ether sulfates, isethionates, etc., wherein the alkyl group has from about 6 to about 30 carbon atoms, alkyl betaines, alkylamido betaines, alkylamido sultaines, etc. See paras. 40-45. Additionally, the compositions may include one or more optional ingredients including a pearlescent or opacifying agent, a thickening agent, humectants, chelating agents, colorants, fragrances, preservatives, etc. See para. 46. Thickening agents which are

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capable of imparting the appropriate viscosity to the composition include PEG-150 distearate, etc. See para. 50.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to use a thickening agent such as PEG-150 distearate in the cleaning composition taught by Patel, '532, Fairley et al, '889, or Baravetto et al, with a reasonable expectation of success, because Booker et al teach the use of PEG-150 distearate as a thickening agent in a similar cleaning composition and further, Patel et al, '532, Fairley et al, '889, or Baravetto et al teach the use of thickening agents in general.

Note that, with respect to the Zein solubility, permeability, and wet-combing force properties as recited by instant claim 17, the Examiner asserts that the broad teachings of Patel et al, '532, Fairley et al, '889, or Baravetto et al, all in combination with Booker et al, would suggest compositions having the same Zein solubility, permeability, and wet-combing force properties as recited by instant claim 17 because Patel et al, '532, Fairley et al, '889, or Baravetto et al, all in combination with Booker et al, suggest compositions containing the same components in the same proportions as recited by the instant claims.

Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over Baravetto et al (US 6,174,522) as applied to claim 1-4, 6-10, and 13-16 above, and further in view of Fairley et al (US 2002/0192180).

Baravetto et al are relied upon as set forth above. However, Baravetto et al do not teach the use of silicone microemulsion in addition to the other requisite components of the composition as recited by the instant claims.

Fairley et al are relied upon as set forth above.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to use a silicone microemulsion in the composition taught by Baravetto et al, with a reasonable expectation of success, because Fairley et al teach the equivalence of silicone microemulsions to silicone emulsions in a similar cleaning composition and, further, Baravetto et al teach the use of silicone emulsions in general.

Claims 5 and 6 rejected under 35 U.S.C. 103(a) as being unpatentable over WO00/02532 as applied to claims 1-4, 7-9, 15, 16, 19, and 20 above, and further in view of Fairley et al (US 2002/0192180).

'532 is relied upon as set forth above. However, '532 does not teach the use of the specific silicone in addition to the other requisite components of the composition as recited by the instant claims.

Fairley et al are relied upon as set forth above.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to use a silicone microemulsion or emulsion in the composition taught by '532, with a reasonable expectation of success, because Fairley et al teach use of silicone microemulsions to silicone emulsions as conditioning agents in a similar cleaning composition and, further, '532 teaches the use of water-insoluble silicone agents in general.

(10) Response to Argument

With respect to WO00/02532, Patel et al, Alvarado et al, Baravetto et al, Fairley et al, or WO99/53889, Applicant states that each of these references do not suggest the claimed ratios, do not disclose the upper limit on the alkyl ethoxy sulfate component of about 8% as recited in claim 1 and 17, does not restrict compositions to those that are not potential eye irritants based on the objective criteria recited in claims 1 and 17, does not hint to any criticality concerning the ratios of and amounts of required surfactants as recited by the instant claims, and do not disclose the limitation of about 2% on the additional harsh surfactants recited in claims 1 and 17. Furthermore, Applicant states that each of these references teach away from the Applicant's claimed invention since the examples in each of these references teach compositions containing more alkyl ethoxy sulfate and added surfactant such as ammonium lauryl sulfate than permitted in the compositions as recited by the instant claims. In response, note that, the teachings of a reference are not limited to the preferred embodiments. The Examiner maintains that each of '532, Patel et al, Baravetto et al, Fairley et al, Alvarado et al, or '889 teach a range of alkyl ethoxy sulfate used in the compositions which overlaps with the range of about 6% to about 8% as recited by the instant claims. For example, Patel et al teach that the compositions may contain from 1% to 30% by weight of an anionic detergent such as an alkyl ether sulfate having from 2 to 6 moles of ethylene oxide which overlaps with the range of alkyl ethoxy sulfate as recited by the instant claims (See column 4, line 55 to column 5, line 20 of Patel et al). Additionally, for example, '889 teaches that the total amount of surfactant (including any co-

surfactant and/or any emulsifier for the silicone component) in shampoo compositions of the invention is generally 0.1 to 50% by weight (See page 12, lines 15-20 of '889) which clearly overlaps with the amount of alkyl ethoxy sulfate and added surfactant as recited by the instant claims.

Furthermore, as stated above, with respect to Alvarado et al, the Examiner asserts that "about 10%" by weight of an alkyl ether sulfate with at least about 2 moles of ethoxylation would overlap with and suggest about 8% by weight of an alkyl ether sulfate having at least 3 moles of ethoxylation as recited by the instant claims.

Alternatively, even if "about 10%" by weight of an alkyl ether sulfate with at least about 2 moles of ethoxylation does not overlap with about 8% by weight of an alkyl ether sulfate having at least 3 moles of ethoxylation as recited by the instant claims, the Examiner asserts that one of ordinary skill in the art would be motivated to use about 8% by weight of an alkyl ether sulfate with at least about 3 moles of ethoxylation in the composition taught by Alvarado et al, with a reasonable expectation of success, because one of ordinary skill in the art would expect similar results when using about 8% by weight of an alkyl ether sulfate with at least about 3 moles of ethoxylation in the composition taught by Alvarado et al based on its teaching of about 10% by weight of an alkyl ether sulfate with at least about 2 moles of ethoxylation. Note that, a prima facie case of obviousness exists where the claimed ranges and prior art ranges do not overlap but are close enough that one skilled in the art would have expected them to have the same properties. Titanium Metals Corp. of America v. Banner, 778 F.2d 775, 227 USPQ 773 (Fed. Cir. 1985). See MPEP 2144.05.

Additionally, the Examiner asserts that while each of WO00/02532, Patel et al, Alvarado et al, Baravetto et al, Fairley et al, or WO99/53889 teach several examples containing greater than 2% by weight of an added surfactant such as an alkyl sulfate, the teachings of a reference are not limited to the preferred embodiments. The Examiner asserts that the broad teachings of WO00/02532, Patel et al, Alvarado et al, Baravetto et al, Fairley et al, or WO99/53889 disclose embodiments which do not require the addition of specific added surfactants which would meet the limitation of "less than about 2% of an added surfactant selected from the group consisting of alkyl sulfates, alkyl or alky aryl sulfonates, ethoxylated alkylphenols, and ethanolamides of aliphatic acids" as recited by instant claims 1 and 17. The Examiner maintains that the broad teachings of WO00/02532, Patel et al, Alvarado et al, Baravetto et al, Fairley et al, or WO99/53889 suggest compositions having the same ratio of betaine surfactant to hydroxysultaine and alkyl ethoxy sulfate to the sum of the weights of betaine surfactant and hydroxysultaine as recited by the instant claims.

Furthermore, the Examiner maintains that WO00/02532, Patel et al, Alvarado et al, Baravetto et al, Fairley et al, or WO99/53889 suggest that the amount of eye irritating components such as anionic surfactants used in the compositions may be varied, and one skilled in the art would recognize that varying the amounts of eye irritating components such as anionic surfactants would make a significant difference with respect to eye irritation. Thus, the Examiner maintains that the broad teachings of Patel et al, Baravetto et al, '532, Alvarado et al, '889, or Fairley et al suggest compositions having the same % permeability of fluorescein leakage less than about 10% as

measured by the Fouorescein Leakage Assay as recited by the instant claims because Patel et al, Baravetto et al, '532, Alvarado et al, '889, or Fairley et al suggest compositions containing the same components in the specific amounts as recited by the instant claims.

With respect to the rejection of claims 11-13 and 17 under 35 USC 103 using WO00/02532, Patel et al, Baravetto et al, Fairley et al, or WO99/53889, all in combination with Booker et al, Applicant states that Brooker et al do not remedy the shortcomings of WO00/02532, Patel et al, Baravetto et al, Fairley et al, or WO99/53889. In response, note that, as set forth above, the Examiner maintains that WO00/02532, Patel et al, Baravetto et al, Fairley et al, or WO99/53889 are sufficient to render the instant claims obvious under 35 USC 103. Brooker et al is a secondary reference relied upon for its teaching of PEG-150 distearate. The Examiner maintains that one of ordinary skill in the art would clearly have been motivated to use PEG-150 distearate in the compositions taught by WO00/02532, Patel et al, Baravetto et al, Fairley et al, or WO99/53889, with a reasonable expectation of success, because Booker et al teach the use of PEG-150 distearate as a thickening agent in a similar cleaning composition and further, Patel et al, '532, Fairley et al, '889, or Baravetto et al teach the use of thickening agents in general.

With respect to the rejection of claims 5 and 6 under 35 USC 103 using WO00/02532 in combination with Fairley et al, Applicant states that Fairley et al do not remedy the shortcomings of WO00/02532. In response, note that, Fairley et al is a secondary reference relied upon for its teaching of a silicone microemulsion or

emulsion. The Examiner maintains that one of ordinary skill in the art would clearly have been motivated to use a silicone microemulsion or emulsion in the composition taught by '532, with a reasonable expectation of success, because Fairley et al teach use of silicone microemulsions to silicone emulsions as conditioning agents in a similar cleaning composition and, further, '532 teaches the use of water-insoluble silicone agents in general.

Further, with respect to the Declarations filed under 37 CFR 1.132, the Examiner asserts that the "First Declaration" (dated April 17, 2006) show that the Zein solubilities of the mildest exemplified prior art compositions exceed the maximum 1% level required for low ocular irritation potential. Additionally, Applicant states that the results of the "Second Declaration" (dated September 28, 2006) show that mildest exemplified prior art compositions exceed the maximum Fluorescence Leakage score characteristic of compositions having low ocular irritation. At the outset, the Examiner would like to point out that the instant claims simply require that the composition has either a Zein solubility of less than about 1% as measured by the Zein Solubility or a % permeability of fluorescein leakage less than about 10% as measured by the Fluorescein Leakage Assay. With respect to the "First Declaration", the Examiner maintains, as set forth above, that the teachings of a reference are not limited to the preferred embodiments and that while the data may show that particular examples of Patel et al, Baravetto et al, and Fairley et al do not have the same % Zein solubility as recited by the instant claims, the Examiner maintains that the teachings of Patel et al, Baravetto et al, and Fairley et al suggest compositions having the same % Zein solubility as recited by the instant

claims because Patel et al, Baravetto et al, and Fairley suggest compositions containing the same components in the same amounts as recited by the instant claims. Note that, the "First Declaration" provides no data with respect to the other primary references, '532, Alvarado et al, or '889.

With respect to the "Second Declaration", the Examiner maintains that the teachings of a reference are not limited to the preferred embodiments; all the Examples of the prior art prepared and presented in the Second Declaration contain high amounts of anionic surfactant and one skilled in the art would reasonably expect that the exemplified compositions of the prior art containing such high amounts of anionic surfactants would create a substantial amount of eye irritation. However, Patel et al, Baravetto et al, and Fairley all teach that the amount of anionic surfactant may be varied and such variations would make a significant difference with respect to eye irritation. For example, Baravetto et al teach that anionic surfactant may be used in amounts from 5 to 30% by weight (See para. 56) and at low amounts of anionic surfactant such as 5% by weight, the amount of eye irritation would be much less than at 14% by weight as presented in the Declaration. Additionally, note that, 5% by weight of anionic surfactant as taught by Baravetto et al falls within the range of 6% to 8% by weight of anionic surfactant as recited by instant claim 1. Thus, the Examiner maintains that the broad teachings of Patel et al, Baravetto et al, or Fairley et al suggest compositions having the same % permeability of fluorescein leakage less than about 10% as measured by the Fouorescein Leakage Assay as recited by the instant claims because Baravetto et al, Patel et al, or Fairley et al suggest compositions containing the same components in the

specific amounts as recited by the instant claims. Furthermore, the Examiner maintains that the Declaration simply shows what one of ordinary skill in the art would reasonably expect and does not present any evidence of unexpected and superior results; when varying the amounts of anionic surfactant, large amounts of anionic surfactant would create more eye irritation while lesser amounts of anionic surfactant would create less eye irritation. Note that, similar to the First Declaration, the "Second Declaration" provides no data with respect to the other primary references, '532, Alvarado et al, or '889.

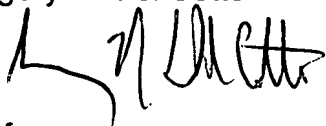
(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Gregory R. Del Cotto



Conferees:

Greg Mills 

Lorna Douyon 